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Supreme Court, U.S.
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No. 03-1364

IN THE

Supreme Court of the United States

BRUCE J. GERMAN,

Petitioner,

v.

THERM-O-DISC, INC. and
OLD REPUBLIC INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of any substantive or procedural due process violations, this Court should wade into the abyss that the Supreme Court of Ohio created with its infamous decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 710 N.E.2d 1116 (Ohio 1999).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Therm-O-Disc, Inc. is a wholly-owned subsidiary of Emerson Electric Co., a publicly traded company.

Respondent Old Republic Insurance Company is a wholly-owned subsidiary of Old Republic International Corporation, a publicly traded company.

INTRODUCTION

Respondents Therm-O-Disc, Inc. ("Therm-O-Disc"), and Old Republic Insurance Company ("Old Republic") respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Supreme Court of Ohio's decision in this matter. As discussed below, the Supreme Court of Ohio did not violate Petitioner's right to substantive or procedural due process when it reversed the decision of Ohio's Court of Appeals for the Fifth District on the authority of *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256 (Ohio 2003). Rather, the actions of the Supreme Court of Ohio merely recognize the constitutionally sound principle that its decisions have retroactive effect.

STATEMENT OF THE CASE

This case is one of the numerous cases for uninsured/ underinsured motorist ("UM/UIM") coverage that flooded Ohio courts following the Supreme Court of Ohio's decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 710 N.E.2d 1116 (Ohio 1999). Petitioner's Statement of the Case omits or understates four facts material to this Court's consideration of the issues. First, Petitioner was not a party to the insurance contracts entered into by and between Emerson Electric Co. and Old Republic that were at issue in this matter. Second, Petitioner was not within the course and scope of his employment when he was injured on January 9, 1997. Third, neither Therm-O-Disc nor Old Republic ever conceded in the courts below that *Scott-Pontzer* was properly decided. Finally, no court, at any time in the nearly four-year history of this case, entered judgment in Petitioner's favor.

REASONS FOR DENYING THE PETITION

Neither substantive nor procedural due process dictates that Petitioner is immune from the retroactive application of decisions issued by the Supreme Court of Ohio. In interpreting the insurance contracts at issue in this case, the Supreme Court of Ohio relied on *Galatis* to find that Petitioner was not an insured for purposes of UM/UIM coverage. This determination reflects the well-settled principle that decisions of the Supreme Court of Ohio have retroactive effect. In the absence of any substantive or procedural due process violations, this Court should deny Petitioner's request for a Writ of Certiorari.

I. No Vested Rights Exist to Support the Alleged Violation of Petitioner's Right to Substantive Due Process.

The Supreme Court of Ohio did not violate Petitioner's right to substantive due process by relying on *Galatis* to reverse the decision of Ohio's Court of Appeals for the Fifth District. Petitioner claims that, in disregard of his right to substantive due process, the Supreme Court of Ohio extinguished his property interests in a cause of action that arose under *Scott-Pontzer*. [Pet., at p. 8]. Petitioner's argument assumes that he had vested property rights in such cause of action, and then presupposes the substantive protections of the due process clause apply to those rights. Petitioner is wrong on both counts.

First, the property rights that Petitioner claims in his cause of action never vested. No court entered a final unreviewable judgment in Petitioner's favor. *See, e.g., Lyon v. Agusta, S.P.A.*, 252 F.3d 1078 (9th Cir. 2001) (holding property rights in a cause of action do not vest until a final unreviewable judgment has been obtained). Second, as Justice Powell has noted, "Even if one assumes the existence of a property right . . . not every such right is entitled to the protection of substantive due process."

Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, at 229 (POWELL, concurring). Instead, substantive due process applies only to constitutionally created rights, not to state-created property rights. *Id.*; *see also Wooten v. Campbell*, 49 F.3d 696 (11th Cir. 1995); *Nilson v. Layton City*, 45 F.3d 369 (10th Cir. 1995); and *Greenbriar Village, LLC v. Mountain Brook City*, 345 F.3d 1258, 1262 (11th Cir. 2003). Without any vested rights worthy of substantive due process protection, the Supreme Court of Ohio did not transgress any of Petitioner's constitutional rights when it reversed the decision of the Court of Appeals for the Fifth District on the authority of *Galatis*.

II. Procedural Due Process Does Not Require that Petitioner Be Immune from the Retroactive Application of Decisions Issued by the Supreme Court of Ohio.

Nothing in the federal Constitution prohibits the retroactive effect of a judicial decision. Yet Petitioner argues that his reliance on *Scott-Pontzer* in light of procedural due process, as explained in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), protects him against the retroactive application of *Galatis*. [Pet., at p. 10-11]. This Court, however, has largely abandoned *Chevron Oil*, and has expressly held that reliance interests are insufficient to thwart the retroactive application of a judicial decision. *See, e.g., Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993).

In *Harper*, the Supreme Court of Virginia had used *Chevron Oil* to deny retroactive effect to this Court's interpretation of federal law. This Court disagreed with the Supreme Court of Virginia's reliance on *Chevron Oil* by explaining:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct

> review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith*'s ban against "selective application of new rules." 479 U.S. at 323. Mindful of the "basic norms of constitutional adjudication" that animated our view of retroactivity in the criminal context, id., at 322, we now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases. In both civil and criminal cases, we can scarcely permit "the substantive law [to] shift and spring" according to "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam*, supra, at 543 (opinion of SOUTER, J.). Our approach to retroactivity heeds the admonition that "the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently." *American Trucking*, supra, at 214 (STEVENS, J., dissenting) (Emphasis added).

509 U.S. at 97.

Two years later, in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745 (1995), this Court used *Harper* to reverse the Supreme Court of Ohio's refusal to give retroactive application to *Bendix Autolite Corp. v. Enterprises, Inc.*, 486 U.S. 888 (1988). *Bendix* held that an Ohio tolling provision for statutes of limitations for non-Ohio residents was unconstitutional. In reversing the Supreme Court of Ohio, this Court stated:

> The Ohio Supreme Court's justification for refusing to dismiss Hyde's suit is that she and others like her,

> may have reasonably relied upon pre-*Bendix* law – a reliance of the same kind and degree as that involved in *Chevron Oil*. But this type of justification – often present when prior law is overruled – is the very sort that this Court, in *Harper*, found insufficient to deny retroactive application of a new legal rule (that had been applied in the case that first announced it).

514 U.S. at 759. *See also Ryder v. United States* (1995), 515 U.S. 177, 184-85, 132 L. Ed. 2d 136 (questioning whether *Chevron Oil* has any "continuing validity" after *Harper* and *Hyde*). Because reliance is insufficient to establish a procedural due process violation, this Court should deny Petitioner's request for a Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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